

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

)	
In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	

TO: The Commission

**REPLY COMMENTS OF XPEDITE SYSTEMS, LLC
D/B/A PREMIERE GLOBAL SERVICES**

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SUMMARY

The Commission's Notice of Proposed Rulemaking — and the comments filed in response — included significant discussions of the proper assignment of responsibilities for senders of facsimile (“fax”) communications under the new Junk Fax Prevention Act of 2005. Xpedite Systems, LLC d/b/a Premiere Global Services (“Xpedite”) files these comments to stress the importance of the Commission distinguishing in its rules between senders (i.e., the creators/originators of the fax content) and fax transmitters (e.g., fax broadcasters or common carriers). More specifically, the Commission should reiterate its earlier conclusion that certain rules and liabilities applicable to senders do not extend to fax transmitters who are mere conduits for the fax communications. Both the Commission and Congress have consistently and repeatedly recognized this distinction under the TCPA. Reaffirming this distinction in this rulemaking will not only bring clarity, it will also help prevent transmitters from exposed to frivolous and expensive litigation (including class actions). In addition, while Xpedite agrees with many commenters' recommendations that the Commission's new rules should ensure flexibility, the Commission should also provide companies with sufficient guidance that allows them to comply with the new regulations and thus avoid frivolous and strategic litigation.

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¹ Notice of Proposed Rulemaking and Order, *Rules & Regulations Implementing the Telephone Consumer Protection Act*, CG Docket Nos. 02-278 & 05-338, FCC 05-206 (rel. Dec. 9, 2005) (*Notice*); Junk Fax Prevention Act of 2005, Pub L. No. 109-21, 119 Stat. 359 (2005) (*JFPA*).

ensure flexibility, the Commission should also provide companies with sufficient guidance that allows them to comply with the new regulations and thus avoid frivolous and strategic litigation.

BACKGROUND

Xpedit is a global outsource provider of business communications and business process solutions, including data delivery services by fax, e-mail, voice and text messaging to customers throughout the United States. Xpedit provides broadcast fax services for over a quarter of the Fortune 500, with clients in nearly every business sector, including healthcare, technology, publishing, financial services, travel and hospitality. As part of its broadcast fax business, customers use Xpedit's broadcast fax services for transmission to their customers and constituents of alerts and notifications, statement and invoice delivery, document automation and other applications, including, for example, mortgage rate updates, equity research reports, regulatory updates, confirmations of securities trades and travel reservations, newsletters, subscription renewals, association dues notices, and bank statements. Xpedit's Terms and Conditions of service require Xpedit's customers to comply with applicable laws, including those relating to unsolicited fax advertisements.

I. THE COMMISSION'S RULES SHOULD DISTINGUISH FAX TRANSMITTERS FROM SENDERS

A. The Commission and Congress Have Recognized the Distinctions Between Fax Transmitters and Senders

In evaluating the various comments relating to senders' responsibilities under the JFPA, it is important for the Commission to recognize the significant differences between senders and fax transmitters. The fundamental distinction is that transmitters are not themselves senders, but are merely conduits through which senders transmit their faxes. Fax broadcasters such as Xpedit, for instance, transmit fax messages for their clients without exercising any editorial control or discretion over the content of the messages. In fact, fax broadcasters often do

not even view the fax messages they transmit because senders provide those faxes through an automated computer process. In this respect, they are no different from common carriers in that they merely facilitate the transmission of information. In addition, fax broadcasters generally do not provide the numbers to which the faxes are sent. Those numbers are instead gathered by the sender and then provided by the sender to the fax broadcaster.

Recognizing these critical differences, the Commission has repeatedly distinguished between senders and fax transmitters in crafting rules in this proceeding. For instance, in 1995, and in response to requests for clarification about whether fax broadcasters (like common carriers) were immune from liability under the TCPA,² the Commission explained:

We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and *that fax broadcasters are not liable for compliance with this rule*. This interpretation is consistent with the TCPA's legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message.³

In its *2003 TCPA Order*, the Commission reaffirmed that fax broadcasters would not be subject to liability under the TCPA if they did not, for instance, supply the recipient's fax numbers to the client or determine the content of the fax:

We agree, however, that if the company whose products are advertised has supplied the list of fax numbers, that company is in the best position to ensure that recipients have consented to receive the faxes and should be liable for violations of the prohibition. Therefore, the fax broadcaster will not be responsible for the ads,

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 (1991), *codified at* 47 U.S.C. § 227 (*TCPA*).

³ Memorandum Order and Opinion, *Rules & Regulations Implementing the Telephone Consumer Protection Act*, 10 FCC Rcd 12,391, 12,407 (1995) (*1995 TCPA Order*) (emphasis added).

in the absence of any other close involvement, such as determining the content of the faxed message.⁴

The Commission's long-standing distinction between underlying senders and fax transmitters is also consistent with the legislative history of the TCPA. In the Senate Report on the TCPA, the Senate Commerce Committee clarified that the TCPA was not intended to impose liability on transmitters such as common carriers and fax broadcasters:

The regulations concerning the use of [fax] machines apply to the person initiating the telephone call or sending the message and do not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content on the call or message.⁵

Both Congress and the Commission have already — and repeatedly — recognized the important distinctions between senders and fax transmitters. Xpedite urges the Commission to maintain this distinction as it evaluates comments and implements its rules, particularly the rules governing opt-out requests described below.

Reaffirming this distinction would not only bring clarity, it would also help prevent transmitters from being exposed to frivolous and expensive litigation (including class actions). For instance, Xpedite currently provides opt-out services for certain customers. The Commission should clarify that providing these sorts of services does not transform a transmitter into a sender, nor does it subject transmitters to liabilities under the TCPA. Such a clarification would encourage the deployment of more efficient services like these by removing the threat of litigation (which, though frivolous, can be expensive for transmitters to resolve).

⁴ Report and Order, *Rules & Regulations Implementing the Telephone Consumer Protection Act*, CG Docket Nos. 02-278, 18 FCC Rcd 14,014, 14,130-32 (2003) (*2003 TCPA Order*).

⁵ S. Rep. No. 102-178, at 9 (1991).

B. Opt-Out Requests Should Apply Only to the Underlying Sender

The Notice sought comment on whether an opt-out request “will extend to the underlying business on whose behalf the fax is transmitted.”⁶ A number of commenters noted that this question was unclear or confusing, and Xpedite agrees.⁷ The premise of the question seems to assume — contrary to the Commission’s past rulings and Congressional intent — that an opt-out request applies to the fax transmitter rather than to the underlying sender. Some commenters stated that the Commission should have asked precisely the opposite question — whether an opt-out request directed to a *underlying sender* should extend to the *fax transmitter* that transmitted the fax on the sender’s behalf.⁸ If that is the question the Commission intended to ask, we maintain that an opt-out request should not go downstream to the fax transmitter. If the Commission meant to ask the question in the Notice, then we emphatically disagree that an opt-out notice should apply in the first instance to a fax transmitter. That would make no sense, since the transmitter has no control over the content of the message or the recipient, and is a mere conduit.

Assuming that the Commission was focusing on whether an opt-out notice should be extended from sender to transmitter, several commenters argued that an opt-out request sent to a fax transmitter should apply only to the underlying sender.⁹ First, commenters noted that

⁶ Notice, at ¶ 25.

⁷ Comments of American Business Media, CG Docket No. 05-338, at 13-14 (filed Jan. 11, 2006) (*ABM Comments*); Comments of the National Association of Wholesaler-Distributors, CG Docket Nos. 02-278 & 05-338, at 11-12 (filed Jan. 18, 2006) (*NAWD Comments*).

⁸ *Id.*

⁹ Comments of the American Bankers Association, CG Docket No. 05-338, at 5 (filed Jan. 18, 2006) (*American Bankers Association Comments*); *ABM Comments* at 13-14; *NAWD Comments* at 11-12; Comments of the National Federation of Independent Business, CG Docket Nos. 02-278 & 05-338, at 6-7 (filed Jan. 18, 2006) (*NFIB* (continued...))

such a rule would be over-inclusive.¹⁰ There is simply no way to determine if a recipient sending an opt-out request intended to opt-out from receiving faxes from one particular sender or from *all* senders who happen to use that fax transmitter. If the Commission adopted overbroad regulations assuming (without evidence) that the opt-out applied to all faxes, recipients who opt-out could unwittingly be opting-out from faxes that they intended and desired to continue receiving. Second, commenters also echoed the Commission's past Orders by explaining that fax transmitters are not senders and thus have no control over either the content of the fax or the selection of the number to which it is sent.¹¹ A regulatory regime that focused on fax transmitters would therefore shift the burden of compliance to the party that had no responsibility for the creation of the fax content, for the determination of the recipients, or for any possible violation.

These arguments are persuasive and should be followed by the Commission. Regulating with a broad brush would threaten too many legitimate fax communications along with the business relationships that rely upon them. Indeed, it has been Xpedite's experience that many recipients are on the lists of multiple senders. Commenters are therefore correct that overbroad regulations could have the perverse effect of denying recipients faxes that they never intended to stop receiving. In addition, a contrary rule would disrupt many of the efficient and effective opt-out systems already in place. For instance, some of Xpedite's customers use an automated system in which toll-free opt-out numbers with "PINs" specifically correspond to

Comments); Comments of the National Newspaper Association and Newspaper Association of America, CG Docket No. 05-338, at 15 (filed Jan. 18, 2006) (*NNA/NAA Comments*).

¹⁰ *American Bankers Association Comments* at 5; *ABM Comments* at 14; *NAWD Comments* at 11-12; *NFIB Comments* at 7.

¹¹ *NAWD Comments* at 12; *NNA/NAA Comments* at 15.

individual senders. Thus, when recipients opt-out, the system can automatically remove the number from the specific sender's list. If, however, the Commission adopted alternative rules, transmitters like Xpedite who offer opt-out services to their customers would be forced to implement entirely new and potentially expensive programs to ensure that recipients were removed from all lists sent through the transmitter (whether the recipient actually intended to be removed from such lists or not). This type of global opt-out will inevitably have unintended consequences. For example, if a recipient opted out of a fax from Xpedite customer Company ABC Corp., then that recipient may have unintentionally opted out from a requested trade association newsletter or even a hotel confirmation.

II. THE COMMISSION SHOULD TAKE STEPS TO PROVIDE GUIDANCE AND TO PROTECT BUSINESSES FROM FRIVOLOUS LITIGATION

A. "Clear and Conspicuous"

The Notice sought comment on whether the Commission should define the circumstances in which a notice will be considered "clear and conspicuous."¹² Commenters differed somewhat on whether and how the Commission should prescribe these rules.¹³ The important point is that the rules should give senders sufficient flexibility in a market with increasingly complex and diverse business relationships. Rigid and overly specific notice requirements will not only be burdensome, they will potentially expose senders and fax transmitters to litigation if excessively formalistic notice requirements are not met.

¹² Notice, at ¶ 20.

¹³ Compare, e.g., Comments of the Attorneys General of Arkansas, Connecticut, Kentucky and New Mexico, CG Docket No. 05-338, at 12-16 (filed Jan. 18, 2006) (*Attorneys General Comments*) with Comments of Bank of America, CG Docket No. 05-338, at 3 (filed Jan. 18, 2006) (*Bank of America Comments*).

The Notice asked whether the rules should permit the JFPA's notice requirements to be combined with the pre-existing identification requirements for fax transmissions.¹⁴ That approach will make sense for many senders and transmitters, and Xpedite strongly recommends that the rules permit this more efficient approach. In addition, some senders and transmitters may want to provide notice information in bottom or side margins. The Commission should therefore adopt a rule clarifying that opt-out notices in these places on the first page will be deemed "clear and conspicuous" notice. Further, Xpedite also recommends that the Commission clarify that the required identification information need not be repeated – i.e., if the opt-out phone number, e-mail, and name of business already appear in the identification "pilot line," the sender should not have to repeat this information in a separate notice.

Adopting this approach would minimize regulatory burdens and provide a number of other advantages to senders and transmitters. For one, it would save senders money. In the fax communications market, senders generally pay by page or by minute. If notice requirements cause fax content to spill over to the next page (which would also increase transmission time), senders would incur unnecessary costs or be forced to shrink their fax content to comply with the Commission's notice requirements. Second, consumers are used to looking for company information in these spaces, and senders and fax transmitters can readily add a notice there.

B. "Voluntarily Made Available"

Commenters generally opposed adopting rules that would specifically enumerate circumstances in which it will be deemed that the recipient "voluntarily agreed to make available

¹⁴ Notice, at ¶ 21.

its facsimile number” in the context of an EBR.¹⁵ Commenters were equally skeptical of the Commission’s proposal to require senders or transmitters to take additional steps to confirm that numbers maintained in public directories were voluntarily made available.¹⁶

Xpedite agrees with these concerns. Similarly to the attempt to define “clear and conspicuous,” attempting to prescribe in advance all the specific circumstances through which compliance could be established would necessarily be incomplete.¹⁷ Further, requiring senders or transmitters to verify directory information compiled by other parties would impose substantial and unnecessary burdens on senders and transmitters — with little benefit to recipients.

The Commission could assist all parties by identifying certain safe harbors that create a presumption that a fax number was “voluntarily” made available while leaving open the possibility that other mechanisms could establish compliance. The comments included a number of potential safe harbors including obtaining numbers from telephone books, public databases,

¹⁵ See *ABM Comments* at 6; Comments of Consumer Bankers Association, CG Docket No. 05-338, at 4-6 (filed Jan. 18, 2006) (*CBA Comments*); Comments of Lorman Education Services, CG Docket Nos. 02-278 & 05-338, at 16-18 (filed Jan. 18, 2006) (*Lorman Comments*); Comments of the National Association of Realtors, CG Docket Nos. 02-278 & 05-338, at 3-4 (filed Jan. 18, 2006) (*NAR Comments*); Comments of the Mortgage Finance Coalition, CG Docket Nos. 02-278 & 05-338, at 11-12 (filed Jan. 18, 2006) (*MFC Comments*). But see Comments of Robert Biggerstaff, CG Docket No. 05-338, at 14-19 (filed Jan. 9, 2006) (*Biggerstaff Comments*); Comments of the Electric Privacy Information Center, CG Docket No. 05-338, at 1-3 (filed Jan. 18, 2006) (*EPIC Comments*).

¹⁶ ACA International’s Comment, CG Docket Nos. 02-278 & 05-338, at 7-8 (filed Jan. 18, 2006) (*ACA Comments*); *American Bankers Association Comments* at 3; Comments of the American Financial Services Association, CG Docket No., 05-338, at 4 (filed Jan. 18, 2006) (*AFSA Comments*); Comments of the American Society of Travel Agents, Inc., CG Docket Nos. 02-278 & 05-338, at 6-7 (filed Jan. 18, 2006) (*ASTA Comments*); *Bank of America Comments* at 3; *CBA Comments* at 5-6; Comments of Everett Laboratories, Inc., CG Docket Nos. 02-278 & 05-338, at 5-6 (filed Jan. 18, 2006) (*Everett Comments*); Comments of The Huntington National Bank, CG Docket No. 05-338, at 6 (filed Jan. 18, 2006) (*Huntington Comments*) *NAWD Comments* at 5-6; Comments of the Reed Elsevier Inc., CG Docket Nos. 02-278 & 05-338, at 8 (filed Jan. 18, 2006) (*Reed Elsevier Comments*); Comments of the Securities Industry Association, CG Docket Nos. 05-338, at 4 (filed Jan. 18, 2006) (*SIA Comments*); Comments of the Yellow Pages Association, CG Docket Nos. 02-278 & 05-338, at 2-3 (filed Jan. 18, 2006) (*YPA Comments*). But see *ABM Comments* at 5-6 (stating that any requirements should not include contacting the compiler).

¹⁷ See also *ABM Comments* at 6; *CBA Comments* at 4-6; *NAR Comments* at 3-4; *MFC Comments* at 11-12.

public directories, brochures, advertisements, websites, and (if exchanged in the context of an EBR) letterheads, business cards, e-mail footers, or similar sources so long as the sender has a legitimate basis to believe the number was voluntarily made available.¹⁸ Finally, if the Commission should adopt rules imposing new verification requirements, it should clarify that those obligations apply only to senders and do not extend to fax transmitters.¹⁹

C. Designating Opt-Out Methods

Xpedite agrees with the numerous commenters who stated that, to be valid, a recipient's opt-out request must be provided through the methods identified in the notice.²⁰ The alternative would simply impose excessive burdens and compliance costs on senders and transmitters. By providing a specific opt-out procedure, businesses can establish more efficient internal procedures and protocols for compliance. If, however, recipients could "opt-out" in undesignated ways that businesses could not predict, it would not only increase compliance and administrative costs, it would practically ensure that senders would miss a significant number of opt-out requests, thus harming recipients and exposing senders and transmitters to potential liability.

¹⁸ *ABM Comments* at 6; Comments of the American Road & Transportation Builders Association, CG Docket Nos. 05-338, at 3 (filed Jan. 18, 2006) (*ARTBA Comments*); *ASAE Comments* at 3; *Lorman Comments* at 17; *MFC Comments* at 11; *NFIB Comments* at 4; Comments by Westfax, Inc., CG Docket No. 05-338, at 7 (filed Jan. 18, 2006) (*Westfax Comments*); *YPA Comments* at 2.

¹⁹ Xpedite also notes that, because transmitters generally do not provide the numbers to which faxes are sent, they would have no of way verifying this information even if they were required to.

²⁰ *ARTBA Comments* at 3-4; *CBA Comments* at 13-14; Comments of The Direct Marketing Association, CG Docket Nos. 02-278 & 05-338, at 8-9 (filed Jan. 18, 2006) (*DMA Comments*); Comments of the International Foodservice Distributors Association, CG Docket No. 05-338, at 5 (filed Jan. 18, 2006) (*IFDA Comments*); *MFC Comments* at 18. See also *ASTA Comments* at 11 (addressing opt-outs sent to a fax transmitter, rather than to the sender itself).

CONCLUSION

In adopting the rules implementing the JFPA, the Commission must take caution to ensure that its regulations do not have the unintended consequences of undermining Congressional intent or exposing businesses to unnecessary litigation and expense. Accordingly, Xpedite urges the Commission to reaffirm its longstanding recognition of the distinction between senders and transmitters. In addition, we urge the Commission to take the appropriate steps to provide the guidance and safe harbors necessary to ensure that its regulations do not have the unintended effect of increasing litigation risks.

Respectfully submitted,

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